Supreme Court, U.S.
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No.

In the Supreme Court of the United States

NEXTEL WEST CORP.

Petitioner,

v.

P.J.'S CONCRETE PUMPING SERVICE, INC.

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an Illinois state court have the power to hear claims of other states' taxpayers seeking to recover state and local taxes erroneously collected in those other states and, in so doing, disregard the mandatory administrative tax refund procedures in those other states?

2. Does an Illinois state court's certification of a class action comprised of sixteen other states' taxpayers – whose tax laws preclude judicial remedies in favor of administrative remedies – violate the Full Faith and Credit Clause and the Due Process Clause, as described in *Phillips Petroleum Co. v. Shutts* ?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Nextel West Corp. is a wholly owned subsidiary of Nextel Communications Inc., a publicly traded company.

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P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp., 803 N.E.2d 1020, 1030-31 (Ill. App. 2004), *appeal denied*, 209 Ill.2d 584, __ N.E.2d __ (2004) [hereinafter "*P.J.'s*"]. The orders and opinions are included in the Appendix, *infra*.

JURISDICTION

On May 15, 2002, an Illinois trial court certified a seventeen-state taxpayer class action against Nextel West Corp. ("Nextel") based on the allegation that Nextel collected telecommunication taxes imposed by municipalities from citizens who did not owe them. One Illinois citizen was the only class representative appointed. The question of class certification was certified for interlocutory review. On April 2, 2003, the Illinois Supreme Court entered a supervisory order directing the Illinois Appellate Court to hear Nextel's appeal from class certification.

On January 27, 2004, the Illinois Appellate Court rejected, *inter alia*, Nextel's argument that Illinois courts constitutionally may not adjudicate the liability of a tax collector who allegedly collected the wrong taxes from citizens of other states pursuant to those other states' tax laws. *P.J.'s*, 803 N.E.2d at 1030-31. Nextel filed a timely petition for rehearing, which was denied. Nextel then filed a timely petition for leave to appeal in the Illinois Supreme Court. On May 26, 2004, the Illinois Supreme Court denied review.

This Court has jurisdiction over the Illinois courts' class certification decision under 28 U.S.C. § 1257. The

decision below is a "final judgment" pursuant to this Court's interpretation of § 1257 in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, this Court recognized four categories of cases in which a state court decision constitutes a final judgment on a federal or constitutional issue, despite the fact that further state court proceedings will go forward. These categories represent types of cases in which "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice....'" *Id.* at 478 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945)).

The Illinois decision below satisfies the jurisdictional standards of 28 U.S.C. § 1257 for two reasons approved in *Cox*, either of which alone would establish an appropriate basis for immediate review.

1. The state court proceedings below cannot obviate the constitutional violation at hand: the overreaching by the Illinois courts and invasion of other states' exclusive sovereign authority over tax disputes. The class action below will bind class members from other states and either (*i*) entitle them to relief from the taxes they erroneously paid or (*ii*) hold that those citizens are *not* entitled to recover. Thus, even if Nextel wins the case on some state-law ground, it will still have been subjected to a seventeen-state class action which the Illinois courts lacked the power to entertain. Even if Nextel were to prevail, the breach of federalism and comity would have already occurred by certification of a class of other states' taxpayers.

2. Even assuming *arguendo* that subsequent state court proceedings rendered moot Nextel's constitutional claim (assuming that Nextel wins on some state-law

ground), "a refusal immediately to review the state court decision might seriously erode federal policy...." *Cox* recognized that parties should not be subjected "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.* at 484 (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555,558 (1963)). *See also Local No. 438 Const. & General Laborers Union, AFL-CIO v. Curry*, 371 U.S. 542 (1983) (Court would review state court proceeding where state court jurisdiction may be preempted by federal agency jurisdiction): *Southland v. Keating*, 465 U.S. 1 (1984) (Court would review state court's refusal to enforce arbitration provision in contract, which would undermine Federal Arbitration Act). These cases, like this one, "involve federal challenges to the jurisdiction of state courts ... The rationale for allowing interlocutory protection in these cases is that a right to be free from harassment becomes sterile when reviewed after the period of harassment has passed." Note, "The Finality Rule for Supreme Court Review of State Court Orders," 91 Harv. L. Rev. 1004, 1030 (1978).

Reversal of the decision below for the reasons contained in this Petition would terminate the litigation as it pertains to the taxpayers of sixteen states. The decision below is more pressing than an ordinary venue or subject-matter jurisdiction dispute because the exclusive sovereign power of states to administer their own tax system has been co-opted by the Illinois courts. Other states' exclusive power to decide their taxpayer claims and Nextel's right under certain state tax laws to be free from taxpayer lawsuits have both been violated. A long line of precedent from this Court, described herein, establishes the important federal policy of minimizing outside

interference with each state's administration of its tax system and handling of tax disputes. That policy would be seriously eroded should the class action below be allowed to proceed.

CONSTITUTIONAL PROVISIONS

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

Amendment XIV, United States Constitution (in pertinent part).

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment X, United States Constitution.

STATEMENT OF THE CASE

Nextel provides wireless telecommunication services in Illinois and numerous other states. *P.J.'s*, 803 N.E.2d at 1023.

Certain municipalities in the State of Illinois are permitted to impose taxes on telecommunications. The Village of Barrington ("Barrington") is one such municipality. *Id.* The Barrington municipal tax ordinances impose taxes on customers with billing

addresses in Barrington. Illinois law requires retailers such as Nextel to collect the tax from customers and to remit monies collected to Barrington. *Id.* Nextel is also obligated to charge and collect the tax obligations of its other customers in Illinois, as well as its customers in numerous other states under a variety of different state taxing regimes, which include over a thousand municipal ordinances that impose taxes on Nextel's customers pursuant to those regimes.

Respondent P.J.'s Concrete Pumping Service, Inc. ("PJCP") was a Nextel customer in Illinois. 803 N.E.2d at 1023. The address PJCP provided when it subscribed for Nextel's service stated that its address was in Barrington. Nextel included a line item on PJCP's bills for city taxes. 803 N.E.2d at 1024.

When Nextel remitted the appropriate amounts of taxes it collected to Barrington, it included amounts collected from PJCP. Nextel did not retain the taxes collected.

When PJCP noticed a "city tax" on its Nextel phone bill, PJCP realized a mistake and contacted Nextel. 803 N.E.2d at 1024. PJCP's address actually falls outside the corporate limits of Barrington in an unincorporated portion of Lake County, Illinois. 803 N.E.2d at 1023. Nextel had already collected municipal taxes from PJCP and remitted them to Barrington.

PJCP filed a complaint against Nextel in the Circuit Court for Lake County, Illinois alleging that Nextel had committed a fraud upon PJCP by collecting Barrington "city taxes", because PJCP's address was not within the corporate limits of Barrington. (*See* Complaint, ¶ 8, C2A.) The first paragraph of the class action complaint asserts:

> Plaintiff seeks declaratory relief and asserts claims against Defendant for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Illinois Consumer Fraud Act"), 815 ILCS 505/1 et seq., and the consumer fraud acts of each state in which Defendant does business and for common law fraud. Plaintiff seeks class-wide relief for Defendant's practice of assessing its customers local, municipal or gross receipts taxes where its customers do not reside in a municipality that authorizes Defendant to assess the taxes for cellular service.

See 803 N.E.2d at 1023.

Nextel moved to dismiss the Complaint on the grounds that, *inter alia*, the municipalities of the several states included within the scope of the Class were the proper defendants. (Defendant's Memorandum of Law In Support of Its Section 2-615 Motion to Dismiss at 3 *et seq.*) Nextel opposed class certification relying upon, *inter alia*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). (Defendant's Memorandum of Law In Opposition to Motion for Class Certification at 16 *et seq.*) Nextel also argued to the Circuit Court that the class action should be limited to Illinois residents only because Nextel could not implead municipalities from other states. (*Id.* at 25 *et seq.*)

The Circuit Court for Lake County, Illinois denied Nextel's motion to dismiss and certified the following class (the "Class") with PJCP as the sole class representative:

> All persons in Illinois, Arizona, Colorado, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin who, on or after August 30, 1996, paid Defendant local, municipal, or substantially-similar taxes at a time when their billing address was not within a municipality that authorized or directed Defendant to collect the tax.

Class Certification Order; *see also* 803 N.E.2d at 1024.

The class action complaint makes clear that the damages sought are the amount of taxes paid by Class members to Nextel (which Nextel distributed to municipalities in seventeen states). (Compl. ¶¶ 32, 39.) PJCP further seeks punitive damages payable to the Class. (Compl. Page 6 ¶ c; Page 8 ¶ c.) PJCP also seeks a declaration that "Plaintiff and all members of the Class are entitled to a refund of all local, municipal, gross receipts or substantially similar taxes Defendant collected." (Compl. Page 9 ¶ c.)

In addition to the Illinois-specific issues raised on appeal, Nextel asserted that Illinois courts lacked the power under the United States Constitution to hear the claims of other states' taxpayers who were included in the Class. (Brief of Appellant Nextel West Corp. at 30 *et seq.*; Reply Brief of Appellant at 18 *et seq.*) The Illinois Appellate Court rejected those arguments and affirmed jurisdiction over taxpayers and taxing regimes of sixteen other states. (Appendix B at 19.) Nextel raised its constitutional arguments in its Petition for Leave to Appeal ("PLA") to the Illinois Supreme Court. (PLA at

18 *et seq.*) The Illinois Supreme Court denied review. (Appendix A.)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS PART OF A RECENT BODY OF STATE COURT DECISIONS WHICH ARE DEVELOPING IN CONFLICT WITH THE CASE LAW OF THIS COURT AND OTHER STATE COURTS REGARDING EACH STATE'S EXCLUSIVE SOVEREIGN AUTHORITY OVER ITS CITIZENS' TAX DISPUTES.

The Illinois decision below deprives home states of authority to decide (*i*) whether their citizens are entitled to tax refunds and, if so, (*ii*) whether private tax collectors like Nextel are liable for erroneously collecting a tax. Just as citizens of one state may not simply walk into federal court with their state-law tax disputes, under the guise of a class action they should not be able to walk across the border into a sister state's courts either and have their home state tax issues litigated.

This Petition should be granted because the decision below diverges from the decisions of this Court and other state courts regarding the vital issue of each state's exclusive sovereign power over its revenue and the laws governing the collection and retention of that revenue.

A. The Decision Below Conflicts With This Court's Decisions Recognizing Each State's Exclusive Authority To Hear Its Citizens' Tax Disputes.

This Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995). The rationale for noninterference by other sovereigns is a pragmatic one:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

Dows v. Chicago, 11 Wall. 108, 110, 20 L.Ed. 65 (U.S. 1871). Bedrock principles such as comity and federalism take on added significance where state taxation is concerned because taxes are "the life-blood of government." *Bull v. United States*, 295 U.S. 247, 259 (1935).

This Court has protected the right of each state to determine for itself what remedies shall be available to its citizens in the tax context (subject only to the minimum requirements of constitutional due process). *See National Private Truck,* 515 U.S. at 582 (discussing *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)).

As a result, this Court long ago refused to allow state taxpayers to bring tax-related claims in federal court where an adequate remedy exists in the respective states themselves. *See First Nat'l Bank of Greeley v. Bd. of County Comm'rs of Weld County*, 264 U.S. 450, 453 (1924) (refusing to hear claim regarding state tax dispute where plaintiff had not first exhausted the administrative procedures afforded under state law).

In *Fair Assessment In Real Estate Ass, Inc. v. McNary*, 454 U.S. 100 (1981), this Court concluded that state "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116. Comity requires respect for the sovereign authority of states over the enforcement of their own tax laws. *Id.* at 112, n.6 (defining "comity" as "a proper respect for State functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.")

This Court has since confirmed that interference by *state courts* can be just as disruptive as federal court interference. Thus, the principles girding *McNary* also preclude § 1983 claims and declaratory judgment actions arising out of state tax disputes – even when the cases are brought in a *state* court. *National Private Truck*, 515 U.S. at 591.

Granting this Petition enables the Court to announce explicitly a crucial rule of law that logically follows from the comity principle running through cases from *Weld County* to *National Private Truck*: Citizens of one state may not use the courts of a different sovereign to

avoid bringing their tax disputes within the remedial framework provided in their home states. Put another way, one state may not allow its courts to become a haven for undermining the exclusive authority of sister states to hear and to remedy their taxpayers' disputes. The decision below is antithetical to this Court's decisions regarding sovereignty, comity and federalism; therefore, immediate review is warranted.

B. State Courts Have Customarily And Appropriately Refused To Hear Tax Disputes From Other States.

Principles of sovereignty and comity have led state courts to refuse to hear tax disputes from other states. The Court of Appeals of New York has held that "for our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State." *City of Phila. v. Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962). *See also Ferguson v. Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001); *State of Minnesota v. Karp*, 84 N.E.2d 76, 79 (Ohio App. 1948).

The Arkansas courts in *Ferguson* denied class certification of a proposed multi-state class of customers who challenged a grocery store's collection of sales taxes. While the Arkansas Supreme Court held that the plaintiffs had failed to satisfy the requisites for the Arkansas class action statute, it is noteworthy that the Arkansas trial court found "that it was without jurisdiction to order the treasuries of other states to refund tax revenues." 37 S.W.3d at 592, 595 (discussing lower court's decision).

The Ohio courts in *Karp* concluded that it would be unconstitutional for one state to use the courts of another state to enforce the former's tax laws:

> That, it seems to us, was an attempt by Minnesota to extend its sovereignty beyond its boundaries and control and bind the defendant. No such power resides in any state and an attempt to so extend its power is void and violates the XIVth Amendment to the Constitution of the United States. To give effect to such an attempt would deprive the defendant of property without due process of law.

84 N.E.2d at 81.

The law has developed in accordance with Judge Learned Hand's admonition that each state's tax disputes must be decided by its own state courts:

> To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted [*sic*] to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18 (1930)

(holding that a tax collector of one state has no standing to sue in courts of another sovereign). *See also* American Jurisprudence, 2d ed., State and Local Taxation § 778 ("Even if a tax upon a nonresident is a personal liability, the nonresident cannot be sued upon it except in the courts of the state in which it was assessed.").

In effect, each state defers to the courts of a sister state, rather than injecting itself into a sister state's tax controversy. Such deference is a building block of federalism and a fundamental tenet of comity. And, of equal significance, such interstate deference represents a practical and appropriate division of responsibilities because not all states treat taxpayer disputes the same way. Indeed, many states have adopted an administrative scheme to resolve such disputes.

C. A Number Of States Encompassed By The Class Require Citizens To Comply With Administrative Refund Procedures If They Believe They Have Paid An Erroneous Telecommunication Tax. These Laws Are Being Circumvented.

The Class includes citizens who would have absolutely no right to file a lawsuit in the courts of their own states based on the facts asserted in the Complaint in this case, yet they have been permitted to litigate in Illinois. The Illinois courts have disregarded an array of carefully drawn schemes designed to rectify mistakes made by entities required to collect taxes on behalf of state and local governments *without subjecting the tax collectors to lawsuits*.

These administrative remedial schemes evince a public policy decision by the respective states. These

states protect entities like Nextel, the proverbial middle man functioning as a tax collector, from the burden and expense of litigation over mistakes that could otherwise be easily rectified with a refund.

For example, if a customer in Arizona is charged a mobile telecommunication service tax yet "believes that the charge is incorrect, the customer shall notify the [ ] service provider in writing of the contested charge." Ariz. Rev. Stat. § 42.5034.01(B). A service provider like Nextel thereafter has an opportunity to correct any error and/or refund any improperly collected amount. Ariz. Rev. Stat. § 42.5034.01(C). Most significantly, Arizona law provides:

> The procedures in this section are the first course of remedy available to any consumer seeking correction of assignment of place of primary use or taxing jurisdiction or a refund of other compensation for taxes assessed or other charges erroneously collected by the [ ] service provider under this section. No cause of action based on a dispute arising from the collection of taxes by the [ ] service provider under this section shall accrue until that customer has reasonably exercised the rights and procedures prescribed in this section.

Ariz. Rev. Stat. §§ 42.5034.01(D), 42-6007.

Colorado's approach is similar, as is that of Kentucky, Missouri and Utah. "If a customer believes that a tax, charge, or fee assessed ... in the customer's bill for mobile telecommunication service is erroneous ... the customer shall notify the [ ] service provider in writing

within two years after the date the bill was issued." Colo. Rev. Stat. § 39-26-104(1)(c)(II)(A). "Any customer ... may file a claim in the appropriate district court only after complying with the provisions of this subparagraph (II)." Colo. Rev. Stat. § 39-26-104(1)(c)(II)(C). "A customer shall not have a cause of action against a home service provider for any erroneously collected taxes, charges, or fees until the customer has exhausted the procedure set forth in subsection (2) of this section." Ky. Rev. Stat. § 139.775. "A customer may not bring a cause of action against a telecommunications provider on the basis that the telecommunications provider erroneously recovered from the customer municipal telecommunications license taxes authorized by this part unless the customer meets the same requirements that a purchaser is required to meet to bring a cause of action against a seller for a refund or credit as provided in Subsection 59-12-110.1(3)." Utah Stat. § 10-1-408 (as amended by House Bill 273 on March 22, 2004). *See also* Missouri Stat. § 144.190(5) (establishing procedure for requesting refund of telecommunication taxes).

In New Mexico, service providers like Nextel are responsible for assessing and collecting surcharges and remitting them to the state department of revenue. N.M. Stat. § 63-9F-11(B-C). These surcharges are governed by New Mexico's Tax Administration Act, N.M. Stat. § 7-1-2(A)(21). The Tax Administration Act requires taxpayers who dispute the assessment of any tax to file a written protest with the state secretary of taxation and revenue. N.M. Stat. § 7-1-24. Trial courts in New Mexico may not "entertain any proceeding by a taxpayer in which the taxpayer calls into question the taxpayer's liability for any tax or the application to the taxpayer of any provision of the Tax Administration Act". N.M. Stat. § 7-1-22.

Instead, the only judicial remedy available for taxpayer disputes in New Mexico is the right to appeal from decisions of the secretary of taxation and revenue directly to the state court of appeals. *Id.*

North Dakota keeps all tax disputes within the confines of an administrative process, and apparently rejects any judicial cause of action for such disputes. If a North Dakota customer disputes a tax imposed by a mobile telecommunication service provider such as Nextel, the customer must first file a written notice with the provider, as prescribed by statute. N.D. Century Code § 57-34.1-05(1). "If the customer is dissatisfied with the response of the home service provider under this section, the customer may seek correction or refund from the taxing jurisdiction affected." N.D. Century Code § 57-34.1-05(2). "The procedure in this section is the sole and exclusive remedy available to customers seeking correction of assignment of place of primary use, taxing jurisdiction, a refund, or other compensation for taxes or fees erroneously collected by the home service provider." N.D. Century Code § 57-34.1-05(3).

Minnesota requires that tax claims against vendors be brought either in the customer's county or the county of the vendor's principal place of business. Minn. Stat. § 289A.50(7)(f).

There is no cause of action for a sales tax dispute in Kansas unless the taxpayer has first given a company the opportunity to review and refund amounts erroneously collected. "A cause of action against the seller for the over-collected sales or use taxes does not accrue until a purchaser has provided written notice to a seller and the seller has had 60 days to respond." Kansas Stat. § 79-3650.

As is evident from the administrative remedial schemes above, many states have made a conscious public policy decision to protect private entities like Nextel from lawsuits arising from Nextel's mandatory role as tax collector.[1] Likewise, these states have decided that taxpayers do not have any causes of action in the absence of compliance with the home state's administrative process. This Petition is important because these tax laws were ignored by the Illinois courts' decision below.

D. Recent State Court Decisions Have Broken With The Longstanding Refusal Of State Courts To Serve As The Forum For Tax Disputes Involving The Citizens And Tax Laws Of Sister States.

Unfortunately, the path charted by the decision below is laden with undesirable incentives. Without intervention by this Court, the *P.J.'s* decision will encourage litigants in various states to take individual tax disputes in their home states and recast them as multi-state class actions. The resulting nationwide scramble for state taxpayer claims would be an unhealthy condition in our Republic of sister sovereigns.

Beginning with a similar case brought to this Court's attention earlier this year, that scramble has already begun. *See AT&T Corp. v. Allen*, No. 03-1046, *cert. denied*, 124 S. Ct. 2066 (April 26, 2004). *Allen* involved a nearly identical claim raised in an Oklahoma state court against AT&T, another mobile

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[1] In addition to the states described above, each of the states included in the Class has its own array of laws and administrative regulations governing tax disputes and refunds.

telecommunication service provider. As in the case below, *Allen* also involved a multi-state taxpayer case.[2]

This body of law is developing in a way divergent from the longstanding reluctance of state courts to police tax disputes from other states. Not only does the Illinois and Oklahoma courts' approach diverge from sister state court decisions (see Part B *supra*) and ignore sister states' administrative procedures (see Part C *supra*), the decision below also conflicts with a line of authority from this Court preserving each state's exclusive authority over its citizens' tax disputes (see Part A *supra*).

This Court has specifically recoiled from the prospect of having one state's tax collection agents summoned into another sovereign's courts to defend their assessments and face prayers for damages. *McNary*, 454 U.S. at 114. Such a result would have "an undeniable chilling effect" on tax collection because tax collectors might well cease the conduct for which they were being held liable, regardless of whether their assessments and collection efforts had been performed in good faith on behalf of government taxing bodies. *Id.* at 115. This chilling effect on private tax collectors in other states is another example of the interference with other states' tax systems resulting from class certification.

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[2] The class in Allen was defined as:
"All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location where they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia; Wyoming."

For better or worse, multi-state class action practice brings with it powerful forum-shopping incentives and intense pressure on defendants with nationwide exposure to settle, leading to dislocations in the law. Competing multi-state class actions in different jurisdictions often preclude coordination, as exemplified by asbestos and tobacco litigation. This Court should not allow state and municipal taxation to suffer a similar fate. Comity commands that the public fisc of each separate and co-equal sovereign should not be subject to external interference by courts in sister states.

II. THE DECISION BELOW VIOLATES THE FULL FAITH AND CREDIT CLAUSE AS WELL AS THE DUE PROCESS CLAUSE, AS CONSTRUED IN *PHILLIPS PETROLEUM CO. v. SHUTTS.*

The decision below is in conflict with the Court's bedrock decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Illinois courts, like their Oklahoma counterparts in *Allen*, have refused to faithfully apply the tax laws of other states, which would preclude the citizens of those states from suing a private tax collector rather than engaging in an administrative refund procedure or otherwise being compliant with tax laws of their home states. Thus, by including the citizens from such states within the Class, Illinois has already violated the Full Faith and Credit Clause, as interpreted in *Shutts*.

Shutts held that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." (citing *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)). *Shutts*

involved a multi-state plaintiff class action against one defendant. The Kansas courts applied Kansas law to each claim, despite the fact that over 97% of the plaintiffs had no connection with Kansas other than being plaintiffs in the lawsuit. *Id.* at 814-15.

On appeal, this Court found that the Due Process rights of a defendant, as well as a state's obligations to sister states under the Full Faith and Credit Clause, together prohibited Kansas from applying its own law to claims and plaintiffs with whom Kansas had little or no contacts. *Shutts*, 472 U.S. at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

Though Kansas had an interest in protecting its own citizens and regulating Phillips Petroleum's conduct in Kansas, this Court held that "given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with [other] jurisdictions . . ., we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822.

Here, the taxpayers from states such those described in Part I-C *supra* are prohibited by their own state laws from suing Nextel, rather than engaging in the administrative tax refund processes those states have prescribed. By including those taxpayers in the certified Class, the Illinois courts have *ipso facto* refused to apply the law of such other states. This is a violation of the Full Faith and Credit Clause and of this Court's holding in *Shutts* – a violation that both Illinois and Oklahoma have now countenanced.

The decision below also violates Nextel's due process rights under *Shutts* by depriving it of the

protections afforded under those other state laws. There is no certainty that Nextel will be allowed to seek a refund from other states and municipalities for taxes already remitted should a judgment enter against Nextel in the Illinois case below. For states that require tax refunds to originate in the form of administrative claims, a judgment entered in Illinois is not sufficient to entitle Nextel to seek a refund of taxes collected and remitted because the administrative process in those states was never begun. Moreover, it is unlikely Nextel would be the proper party to seek a refund in those states where the taxpayer (not the collector) must initiate the refund process. In light of these problems, the rules and protections governing tax refunds in other states will be evaded, leaving Nextel to pay damages despite not being able to qualify for refunds.

One court pointed to similar concerns in refusing to allow taxpayers to bring common law lawsuits in lieu of administrative tax refund proceedings: "it would throw a monkey wrench into machinery designed to confine suits in the federal courts against the government *in order to protect its private as well as public agents from being whipsawed.*" *Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 353 (7th Cir. 1997) (emphasis added).

Compounding the breach of *Shutts* is the fact that the state laws which Illinois has ignored are laws touching on the core of sister states' sovereignty. This Court recently reiterated that the power to enforce a state's tax laws is an essential attribute of its sovereignty, as is the ability to create administrative remedies for taxpayer claims. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 498 (2003). In fact, this Court has affirmatively counseled states that they may rely on internal procedural safeguards and limited remedies in order to counterbalance the

possibility of unexpected lawsuits that would jeopardize the state treasury.

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint ... The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

McKesson, 496 U.S. at 45; *see also id.* at 50.

As such, there are "obvious" special reasons justifying noninterference by other sovereigns with the procedures created by the states to deal with tax disputes:

> The procedures for mass assessment and collection of State taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the State procedures. If federal declaratory relief were available to test State tax assessments, State tax administration might be thrown into

> disarray, and *taxpayers might escape the ordinary procedural requirements imposed by State law.*

McNary, 454 at 180, n.6 (1981) (emphasis added) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

As four Justices of this Court once acknowledged, taxpayers "should not be able to circumvent the exhaustion requirement by designedly not bringing suit against the single potential defendant to have actually benefited from the collection of the allegedly unlawful tax." *McNary*, 454 U.S. at 135, n.24 (Brennan, J., concurring).

The decision below, like the comparable decision in *Allen*, will allow citizens to escape procedural requirements in their respective home states by electing instead to allow their claims to be decided in out-of-state class actions. The certification of a multi-state taxpayer class below is itself a violation of *Shutts*. Illinois has not applied the tax laws of other states because Illinois courts have included the citizens of those other states in the Class even though their home states prohibit them from raising their claims outside the administrative process. The decision below violates the Full Faith and Credit Clause. And depriving Nextel of the administrative processes in those other states violates the Due Process Clause. Only this Court is in a position to foreclose the attempt by Illinois courts to ignore other states' exclusive prerogative to decide if and how to police their tax laws.

This case presents the Court with the opportunity to craft an appropriate rule that principles of comity and

federalism ordinarily preclude state courts from harboring other states' tax disputes. The Court should preserve for each state an exclusive authority to handle its internal tax disputes. If nothing else, however, this Court should review the judgment below to determine whether *Shutts* prohibits Illinois from applying its own laws to tax disputes with no connection to Illinois by ignoring other states' tax refund administrative procedures.

CONCLUSION

For all of these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted.

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